Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-665

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SOUTHLAND NEWS, INC., a Kentucky corporation,

Petitioner,

vs.

THE CITY OF SPRINGFIELD, an Illinois municipal corporation, and MICHAEL HOUSTON, in his capacity as Mayor of the City of Springfield,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Did the lower federal courts apply correctly the abstention doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), by dismissing petitioner's federal civil rights complaint which sought injunctive and declaratory relief from the enforcement of respondents' theater licensing ordinance, while petitioner's manager was challenging the constitutionality of that ordinance in the Illinois state courts?

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Respondents, the City of Springfield, an Illinois municipal corporation, and Michael Houston, in his capacity as Mayor of the City of Springfield, respectfully pray that a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 27, 1980, be denied.

STATEMENT OF THE CASE

On March 11, 1980, petitioner, a corporation, applied to respondents pursuant to Chapter 42A of the Springfield

City Code for a license to operate a theater. Chapter 42A prohibits the operation of a theater within the City of Springfield without a license. Petitioner's president, treasurer, registered agent, sole shareholder, and manager was Larry Hall. On March 21, 1980, petitioner's application for a theater license was denied because petitioner had indicated to respondents it would not be the actual operator of the theater to which the application pertained.[1] On March 28, 1980, respondents filed a municipal ordinance violation in the Illinois state court charging Larry Hall with a violation of Chapter 42A for operating a theater without a license.[2] This alleged ordinance violation had occurred on February 29, 1980. On March 31, 1980, petitioner filed a federal civil rights lawsuit in the United States District Court for the Central District of Illinois. This lawsuit contested the constitutionality of Chapter 42A and requested

[1] It is important to note that the denial of petitioner's license application presents several factual disputes between petitioner and respondents. On page 6 of petitioner's Petition for a Writ, it is stated that an oral examination of Hall by respondents was undertaken because certain press reports, if substantiated, could enhance the possibility of denying petitioner's license application. Actually, respondents orally examined Hall, petitioner's manager, to discover the name of the corporate license applicant, since no corporate name appeared on the application. Hall's response to this examination was quite muddled. Hall stated that he was not sure which corporation was applying for the theater license. Hall also stated that petitioner did not have the authority to hire employees, or to open and close the theater doors. Based on this information supplied by Hall, respondents deemed it necessary to deny petitioner's application, since respondents believed that petitioner would not be operating the theater in question.

[2] The original ordinance violation complaint charged Hall with several violations of Chapter 42A; however, respondents filed an amended complaint against Hall which charged him with only one violation of Chapter 42A.

injunctive and declaratory relief from the enforcement of this ordinance. On April 17, 1980, the federal district court dismissed petitioner's complaint and cited the abstention principles of *Younger v. Harris,* 401 U.S. 37 (1971), as the basis for dismissal. This decision was appealed to the United States Court of Appeals for the Seventh Circuit, and on June 27, 1980, a three judge panel from the Court of Appeals (with one judge dissenting) affirmed the decision of the federal district court to abstain from hearing petitioner's lawsuit. Petitioner requested a rehearing *in banc* of the Court of Appeals' order, but on September 5, 1980, this request was denied.

While petitioner was importuning the federal courts to hear its civil rights complaint, respondents continued with their prosecution of Larry Hall at the state court level. In response to this prosecution, Larry Hall, represented by petitioner's counsel, filed a motion to dismiss the ordinance violation against him. This motion enumerated the same constitutional objections to Chapter 42A as petitioner had raised in its federal complaint. A copy of this motion is included in the Appendix as Exhibit A. On June 5, 1980, this motion was denied, and on June 25, 1980, Larry Hall was found guilty of violating Chapter 42A of the Springfield City Code. Subsequently, Larry Hall appealed this decision, and it is now pending in the Illinois appellate court.

REASONS FOR NOT GRANTING THE WRIT

The abstention principles of Younger v. Harris, **401 U.S. 37 (1971) are fully applicable to the decision below, since** Hicks v. Miranda, **422 U.S. 332 (1975), precludes petitioner from challenging the constitutionality of respondents' theater licensing ordinance in federal court, while Larry Hall is litigating the constitutional issues in the Illinois state court. Hall is merely petitioner's alter ego, and Hall has the opportunity to raise petitioner's constitutional claims in state court.** Wooley v. May-

nard, 430 U.S. 705 (1977), does not apply to the present case, because Larry Hall has appealed his conviction in the Illinois trial court to the Illinois appellate court. Thus, the controlling authority in the present situation is Huffman v. Pursue Ltd., 420 U.S. 592 (1975). In Huffman v. Pursue Ltd., this Court held that the Younger abstention doctrine applied not only to the state trial level, but also to the appellate level. Some federal district courts have alluded to the decision in Wooley v. Maynard, as support for allowing prospective federal relief even when the federal party is being prosecuted in state court. Such an interpretation of Wooley v. Maynard, however, would seriously undermine the premises of Younger abstention.

The *Younger* abstention principles prevent a federal court from interfering with a pending state proceeding when the constitutionality of a statute or ordinance being litigated in the state proceeding is to be challenged in federal court by a party to the state proceeding.[3] In *Hicks v. Miranda,* 422 U.S. 37 (1975), this Court held that *Younger* abstention was proper when the federal plaintiff was not a party to a pending state proceeding, but did have a substantial stake in the state proceeding and could raise his federal claims in the state proceeding. This derivative preclusion concept stated in *Hicks v. Miranda,* was affirmed by this Court in *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975).

Petitioner, a corporation, wishes to contest the constitutionality of respondents' theater licensing ordinance in federal court. Larry Hall, petitioner's president, treasurer, registered agent, sole shareholder, and manager, is contesting the constitutionality of this same ordinance in the Illinois state court. Certainly, petitioner has a substantial stake in the state court proceeding. If Larry Hall is vindi-

[3] *Younger* abstention is not a bar to a federal court's jurisdiction when there are exceptional circumstances. In *Younger v. Harris,* 401 U.S. 37 (1971), at pp. 51-54, Justice Black illustrated what might be considered exceptional circumstances.

cated in state court, and respondents' ordinance is found to be unconstitutional, Hall would have a free rein to operate a theater within the City of Springfield. Any future arrests of Hall by respondents for operating a theater without a license would obviously be in bad faith. Since Hall is petitioner's alter ego, petitioner would also be free from any future prosecutions by respondents. It is inconceivable how respondents could arrest or prosecute petitioner in good faith without interfering with Hall's operation of a theater, something which respondents would be prohibited from doing.

In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), this Court held that the *Younger* doctrine applied not only to state proceedings at the trial level, but also to proceedings at the appellate level. Two years later, this Court held in *Wooley v. Maynard*, 430 U.S. 705 (1977), that if a party to a state court proceeding does not appeal the decision of the state court as to the constitutionality of a statute or ordinance, that party will not be precluded from contesting the constitutionality in federal court. The distinction between *Huffman* and *Wooley* as stated by this Court in *Wooley* lay in the appeal of the state court decision which was taken in *Huffman*. None was taken in *Wooley;* thus, the state proceeding was over, and there was no basis for abstention. No interference with a pending state proceeding would have ensued.

Petitioner's alter ego, Larry Hall, has appealed his state conviction. This appeal is still pending. Pursuant to *Huffman*, the abstention principles set forth in *Younger* are indeed applicable to petitioner. *Wooley* does not apply to the present case.

Petitioner has cited several federal district court cases which arguably support a prospective federal relief v.

present federal relief dichotomy purportedly established by *Wooley v. Maynard.* SEE: *Eagle Books, Inc. v. Richie,* 455 F. Supp. 73, (D. Utah, 1978); *Boe v. Collelo,* 438 F. Supp. 145 (S.D. N.Y., 1977); *Natco Theaters, Inc. v. Ratner,* 463 F. Supp. 1124 (S.D. N.Y., 1979); *Penthouse International Ltd. v. McAuliffe,* 436 F. Supp. 1241 (D. Ga., 1977), aff'd 610 F.2d 1353 (5th Cir., 1980); *G & E Business Services, Inc. v. McAuliffe,* 480 F. Supp. 239 (D. Ga., 1979); *Maguin v. Miller,* 433 F. Supp. 223 (D. Kan., 1977).

According to petitioner, as long as a federal party requests only prospective relief against the enforcement of a statute or ordinance, it is irrelevant whether the federal litigant is involved in a state proceeding pertaining to the challenged statute or ordinance, since there would be no federal interference with any ongoing state litigation. Consequently, a Federal court would be free to hear the request for prospective relief, unencumbered by the *Younger* doctrine. This analysis of *Wooley* posited by petitioner would leave the *Younger* abstention doctrine emasculated. A federal plaintiff could always avoid *Younger* by drafting a complaint requesting prospective relief, but not present relief.

The bases for *Younger* abstention rest on the tenets of federalism, comity, and judicial economy. In our federalistic form of government, every state's judicial system is presumed to be equally as competent as the federal judicial system in guarding against constitutional infringements. To allow two concurrent proceedings, one state and one federal, which involve the same party and the same allegedly unconstitutional statute or ordinance would fly in the face of *Younger.* Yet, this is the situation which would result if petitioner's interpretation of *Wooley* is followed. A pending state proceeding would be in contention with a

federal proceeding in which the same party to the state proceeding would be litigating the constitutionality of the same statute or ordinance involved in the state proceeding. *Wooley* does not contemplate nor condone this result. A federal litigant should not be permitted to subvert frivolously the sound historical and judicial framework of *Younger* with a mere twist of phraseology.

CONCLUSION

The decision of the United States Court of Appeals for the Seventh Circuit to affirm the dismissal of petitioner's federal civil rights complaint was proper. The Court of Appeals relied on previous decisions by the United States Supreme Court which clearly required the application of *Younger* abstention. Consequently, petitioner's request for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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APPENDIX

EXHIBIT A

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. LARRY HALL, Defendant.	No. 80-OV2-82

MOTION TO DISMISS

NOW COMES the defendant, LARRY HALL, by his attorney, J. STEVEN BECKETT of RENO, O'BYRNE & KEPLEY, and for his Motion to Dismiss the complaint filed herein, alleges and states as follows:

1. That the complaint on its face is multiplicitous in that it charges violations of the Springfield Theater Licensing Ordinance, Chapter 42A, a copy of which is attached hereto, from February 21, 1980 through and including February 29, 1980, in violation of the defendant's rights under the Fourteenth Amendment to the Constitution of the United States and Illinois Revised Statutes.

2. That the defendant has standing to attack and asserts that the Springfield Theater Licensing Ordinance, Chapter 42A, is unconstitutional on its face and as applied to him for one or more of the following reasons:

(a) Said Springfield Theater Licensing Ordinance is vague, indefinite, uncertain and overbroad, lacking

definitive standards, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

(b) Section 42A.6 of said Springfield Theater Licensing Ordinance impermissibly proscribes against the issuance of a license to persons not of good moral character, to persons with previous convictions of enumerated offenses, and based on a history of license revocations or suspensions, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States to freedom of expression. *City of Chicago v. Groffman,* 68 Ill. 2d 112, 368 N.E.2d 891 (1977); *Genusa v. City of Peoria,* 475 F. Supp. 1199 (C.D. Il., 1979), aff'd —— F.2d —— (No. 79-1716, 7th Cir., 4/25/80).

(c) Said Springfield Theater Licensing Ordinance imposes administrative prior restraint without the requirement of judicial participation, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

(d) Said Springfield Theater Licensing Ordinance was utilized by agents and officers of the plaintiff City of Springfield against this individual defendant to prevent him from operating a theater, without benefit of judicial participation, and through the use of threatened physical custodial arrest without any safeguards to provide for the dissemination of material protected under the First Amendment to the Constitution of the United States.

WHEREFORE, the defendant, Larry Hall, prays that the complaint against him be dismissed in bar of action, and further, that Chapter 42A of the Code of Ordinances of the

City of Springfield be declared unconstitutional in whole or in part for one or more of the aforementioned reasons.

LARRY HALL, Defendant
By: J. STEVEN BECKETT
His Attorney

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